No. 82-695

Office-Supreme Court, U.S.
FILED
FEB 14 1983
L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1982

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Appellant,

vs.

CONSTRUCTION LABORERS VACATION TRUST FOR SOUTHERN CALIFORNIA, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE STATE OF CONNECTICUT AND THE NEW YORK STATE DIVISION OF HUMAN RIGHTS, *AMICI CURIAE*

JOSEPH I. LIEBERMAN
Attorney General
CHRISTINA G. DUNNELL
Assistant Attorney General
30 Trinity Street
Hartford, Connecticut 06106
(203) 566-2203

ANN THACHER ANDERSON*
General Counsel
New York State
Division of Human Rights
2 World Trade Center
New York, New York 10047
(212) 488-7650

Attorneys for Amici Curiae

**Counsel of Record*

TABLE OF CONTENTS

PAGE

Interests of the *Amici* and Summary of Argument 1

Point I—The Federal Courts Below Did Not Acquire Jurisdiction 4

Point II—ERISA's Provisions for Preemption Do Not Afford Immunity from Claims of Creditors 7

A. ERISA's preemptive force is not coextensive with the statute as a whole but is explicitly confined to certain regulatory provisions 12

B. The targets of ERISA's preemptive force are limited and specific 15

C. The action of the California agency offers no target for the preemption clause of ERISA 17

Conclusion 19

TABLE OF AUTHORITIES

PAGE

Cases:

Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937) 6
Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981) 13, 14
Arcudi v. Stone & Webster Engineering Corp., *appeal from* 690 F.2d 323 (2d Cir. 1982) docketed Dec. 23, 1982 2
Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936) 6

Franchise Tax Board v. Construction Laborers Vacation Trust, 679 F.2d 1307 (9th Cir. 1982) 1, 13

Gully v. First Nat. Bank in Meridian, 299 U.S. 109 (1936) 5

Harvard College v. Amory, 9 Pick. 446 (Mass. 1830) 8n

King v. Talbot, 40 N.Y. 76 (1869) 8n
Kramarsky v. Delta Air Lines, Inc., —— U.S. —— 73 L.Ed. 2d 1400 (1982) 3n

Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149 (1908) 5

Minnesota Mining & Mfg. Co. v. Minnesota, 444 U.S. 1041 (1980), *dismissing appeal from* 289 N.W.2d 396 (Minn. 1979) 4
Mountain States Tel. & Tel. Co. v. Commissioner, 445 U.S. 921 (1980), *dismissing appeal from* 608 P.2d 1047 (Mont. 1979) 4

National League of Cities v. Usery, 426 U.S. 833 (1976) 18

PAGE

Public Service Comm. of Utah v. Wycoff Co., Inc., 344 U.S. 237 (1952) 6

Shaw v. Burroughs Corp.; Shaw v. Delta Air Lines, Inc.; Shaw v. Metropolitan Life Ins. Co., *prob. juris. over appeal from* 660 F.2d 21 (2d Cir. 1981) *noted sub nomine* Kramarsky v. Delta Air Lines, Inc., 50 U.S.L.W. 3831 (Apr. 19, 1982) 3

Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950) 5, 6

Tennessee v. Union and Planters' Bank, 152 U.S. 454 (1894) 5

United Federation of Teachers Welfare Fund v. State Human Rights Appeal Board, 446 U.S. 803 (1980) 4

U.S. Constitution:

Amendment X 7,18
Amendment XI 7

Federal Statutes:

Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202 6
Employee Retirement Income Security Act of 1974, P.L. 93-406, 29 U.S.C. §§ 1001-1461 ..... *passim*
Labor Management Relations Act of 1947, 29 U.S.C. § 186(c) 7n

28 U.S.C. § 1331 2
28 U.S.C. § 1341 7
28 U.S.C. § 1441 ..... 2, 4
P.L. 95-555, 42 U.S.C. § 2000e-(k) (1978) 3n
P.L. 97-473 (1983) 2, 12n

PAGE

State Constitutions and Statutes:

N.Y. Const. Art. I § 11 2
N.Y. Executive Law, Art. 15 (McKinney 1982) 2, 3
L. 1945 ch. 118 2

Legislative Materials:

120 Cong. Rec. 29,942 (1974) 15n

Regulations:

29 C.F.R. §§ 2550.4146ff. 9n

Miscellaneous:

American Law Institute, *Study of the Division of Jurisdiction between State and Federal Courts* (1969) 5, 6n
Chadbourn & Levin, "Original Jurisdiction of Federal Questions," 90 U. Pa. L. Rev. 639 (1942) 6n
Creed, *ERISA Compliance Reporting and Disclosure* (1981) 8n
1 Restatement of Trusts 2d § 174 ..... 8n
Wright & Miller, *Federal Practice and Procedure* 5, 6

No. 82-695

IN THE

Supreme Court of the United States

October Term, 1982

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Appellant,

vs.

CONSTRUCTION LABORERS VACATION TRUST FOR SOUTHERN CALIFORNIA, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE STATE OF CONNECTICUT AND THE NEW YORK STATE DIVISION OF HUMAN RIGHTS, *AMICI CURIAE*

Interests of the *Amici** and Summary of Argument

The State of Connecticut shares the interest of the Franchise Tax Board of California in the questions presented by this case:** (1) the extent to which the Em-

* The parties have consented to the filing of this brief, and their letters of consent are being filed with the Clerk of this Court pursuant to Rule 36.2 of the Rules of this Court.

** The decision below is reported at 679 F.2d 1307 (9th Cir. 1982).

ployee Retirement Income Security Act of 1974, P.L. 93-406, 29 U.S.C. §§ 1001-1461 ("ERISA") preempts state law and official action thereunder; (2) the extent to which claims of such preemption create a basis for "arising under" jurisdiction, see 28 U.S.C. §§ 1331, 1441; (3) the extent to which the Tenth Amendment limits preemption of state sovereign action or action under state police power.

Connecticut has brought these issues before this Court in *Arcudi* v. *Stone & Webster Engineering Corp.*, No. 82-1085, appeal docketed Dec. 23, 1982, but because that case may be moot or otherwise nonjusticiable, see Jurisdictional Statement therein at 4 ff., this case, to the extent it is not affected by the amendment of ERISA's preemption clause to exempt certain multiemployer welfare plans, see P.L. 97-473, signed into law Jan. 14, 1983, of which the trust here may be an example, may prove controlling in future litigation under ERISA as to Connecticut statutes.

The New York State Division of Human Rights, the nation's oldest fair employment agency, was created in 1945 in exercise of the state's police power and in fulfillment of the provisions of the Constitution of the State of New York, N.Y. Const. Art. I § 11, concerning civil rights. L. 1945 ch. 118. The Division protects workers from discrimination based on race, creed, color, national origin, age, sex, disability, marital status, cleared arrests, and certain types of criminal conviction. The opportunity to obtain employment without such discrimination is a civil right. N.Y. Executive Law, Art. 15 (known as the Human Rights Law) § 291.1 (McKinney 1982).

The Division has an interest in the first two questions enumerated above. Since the enactment of ERISA, the

Division has been named a defendant in approximately eight federal actions seeking declarations that ERISA preempts the Human Rights Law. An appeal in three of these actions—*Shaw* v. *Delta Air Lines, Inc.*, *Shaw* v. *Burroughs Corp.* and *Shaw* v. *Metropolitan Life Ins. Co.*, No. 81-1578 (*"Delta"*)—argued in this Court on January 10, 1983, appears moot or otherwise nonjusticiable,* and may not reach the questions here, which affect the Division's posture in actions still pending in the lower federal courts and its efforts to enforce the Human Rights Law.

The *amici* argue *infra* that claims of preemption by ERISA asserted to bar enforcement of state legislation are defensive, and do not confer "arising under" jurisdiction. The *amici* also argue that the preemptive force of ERISA is not co-extensive with the statute but explicitly confined to specific provisions. In the context of this case, those provisions may regulate fiduciary administration of welfare plans to the exclusion of state statutes regulating such administration, but do not supersede extraneous state laws.

Reversal or vacatur of the decision below would discourage premature federal intervention in state law questions; would support a construction of ERISA's preemption clause which is consistent with the statute's regulatory grasp and the purposes and concerns prompting its enactment; and would facilitate enforcement of state legislation

* Pending action by counsel of record on requests for the filing of a formal suggestion of mootness, the Division submitted a letter to the Clerk of this Court on December 2, 1982 suggesting that *Delta* was moot by virtue of a change in statutory law, see P.L. 95-555, 42 U.S.C. § 2000e-(k) (1978). The Division had attempted to question the "arising under" jurisdiction of the courts below through a motion for divided argument and leave to file a separate brief. The motion was denied. 73 L.Ed.2d 1400 (1982).

which this Court has recognized to be peripheral to ERISA. See *Minnesota Mining & Mfg. Co.* v. *Minnesota*, 444 U.S. 1041 (1980), *dismissing appeal from* 289 N.W.2d 396 (Minn. 1979); *Mountain States Tel. & Tel. Co.* v. *Commissioner*, 445 U.S. 921 (1980), *dismissing appeal from* 608 P.2d 1047 (Mont. 1979); *United Federation of Teachers Welfare Fund* v. *State Human Rights Appeal Board*, 449 U.S. 803 (1980). All these results would serve the interests of the *amici*.

Affirmance, on the other hand, would rewrite the rules of "arising under" jurisdiction to permit earlier federal intervention, and would stretch ERISA's preemptive effect beyond its regulatory grasp, thus hindering enforcement of state policies consistent and coequal in value with the policies expressed in ERISA.

POINT I

The Federal Courts Below Did Not Acquire Jurisdiction.

This case was begun in a California court by an agency of California against a California-based vacation trust to enforce and seek monetary and declaratory remedies under California statutes. The agency sought to make the trust apply trust assets to state tax claims against three beneficiaries.

There being no diversity of parties, the only ground for removal was the trust's claim that the case arose under ERISA. See 28 U.S.C. § 1441(b). The trust based its claim on its status as an ERISA-covered employee benefit plan and on references to ERISA in the complaint.

The test for ascertaining "arising under" jurisdiction is whether the well-pleaded complaint presents on its face a substantial claim founded directly upon federal law. See 13 Wright & Miller, *Federal Practice and Procedure* § 3566 (1975) ("*Wright & Miller*"); American Law Institute, *Study of the Division of Jurisdiction between State and Federal Courts* 169 ff., 478-79 (1969) ("*ALI Study*").

This case does not meet that test. The references to ERISA in the complaint do not confer "arising under" jurisdiction, because they are not essential to the pleading of the California agency's claim under state law, but anticipate the defense put forward by the trust: that ERISA preempts the California statutes invoked in the complaint.

When the only federal issue in a case is whether a federal law bars a state claim set forth in the complaint, the case can neither be brought in federal court by the plaintiff nor removed to federal court by the defendant. *Tennessee* v. *Union and Planters' Bank*, 152 U.S. 454 (1894); see *Gully* v. *First Nat. Bank in Meridian*, 299 U.S. 109 (1936); *ALI Study* at 478-79. Allegations by the plaintiff which anticipate a defense available to the defendant under federal law do not offer a basis for removal.* *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667 (1950); *Louisville & Nashville R.R. Co.* v. *Mottley*, 211 U.S. 149 (1908); 14 *Wright & Miller* § 3721.

The prayer of the California agency for declaratory as well as monetary relief did not convert from state law to

* A different rule could create a "Catch-22" situation for a plaintiff who is required by state law to anticipate a defense, or who tries, consistently with modern theories of pleading, to tell the state court what the dispute is all about.

federal law the basis of the complaint. The agency did not assert a right based directly on ERISA, but instead challenged the trust's arguable immunity under ERISA. The distinction is crucial, see 10 *Wright & Miller* § 2767 at 844-49, under decisions of this Court. In *Skelly Oil Co.* v. *Phillips Petroleum Co., supra* at 673-74, this Court stated, Frankfurter, J., it would "distort the limited procedural purpose of the Declaratory Judgment Act" to permit a party by "artful pleading" to anticipate a defense based on federal law and thus to bring within federal jurisdiction a case that could not otherwise have been heard in a federal court. See also *Public Service Comm. of Utah* v. *Wycoff Co., Inc.*, 344 U.S. 237, 246-48 (1952). If a plaintiff's allegations as to a possible defense of immunity do not afford original "arising under" jurisdiction, they cannot sustain "arising under" jurisdiction by way of removal.*

Moreover, since the jurisdiction of federal courts is not enlarged by the federal declaratory remedy, 28 U.S.C. §§ 2201, 2202, see, *e.g.*, *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 325 (1936); *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 239-41 (193[illegible]) federal jurisdiction was not enlarged by the California agency's invocation of California's declaratory remedy.

Even should this Court now wish to broaden opportunities for removal by repudiating the well-pleaded complaint rule, this case is not the appropriate vehicle. The claim of the California agency is inseparable from enforce-

* Some writers have recommended that a defense based on federal law should afford "arising under" jurisdiction, see, *e.g.*, *ALI Study* 168, 171, 191 ff.; Chadbourn & Levin, "Original Jurisdiction of Federal Questions", 90 *U. Pa. L. Rev.* 639 (1942), but this recommendation presupposes Congressional action. See *ALI Study, passim;* Chadbourn & Levin, *op. cit. supra* at 674.

ment of California laws as to collection of taxes, a state function largely beyond the reach of the lower federal courts. See U.S. Const. Amend. X, XI. This Court should not approve an exercise of removal jurisdiction which enables those courts to thwart indirectly activity they are forbidden to enjoin directly. See 28 U.S.C. § 1341. The immunity claimed by the trust under ERISA, disputed in Point II *infra*, cannot be assumed to limit California's historical and constitutional immunity to interference with essential state functions.

POINT II

ERISA's Provisions for Preemption Do Not Afford Immunity from Claims of Creditors.

ERISA regulates two basic types of employee benefit or "welfare plans".* The trust in this case is a welfare plan.

---

* "Sec. 3. For purposes of this title:

(1) The terms 'employee welfare benefit plan' and 'welfare plan' mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions)." Title I § 3(1), 29 U.S.C. § 1002(1).

The reference to benefits described in Section 302 of the Labor Management Relations Act of 1947, 29 U.S.C. § 186(c) (1978), in-

(footnote continued on next page)

Pension plans are regulated or affected by all four titles of ERISA. Welfare plans are regulated only by Parts 1, 4 and 5 of Title I.

ERISA does not require any employer or union to establish a welfare plan,* but requires those that do to meet the purely regulatory standards in Parts 1, 4 and 5 of Title I. Welfare plans, like pension plans, must meet requirements as to reporting and disclosure, §§ 101-111, 29 U.S.C. §§ 1021-1031, and fiduciary responsibility, §§ 401-414, 29 U.S.C.**

---

corporates exceptions to the restrictions imposed by that Act on payments by an employer to representatives of employees. See Creed, *ERISA Compliance Reporting and Disclosure* 15 (1981).

> "Some guidance is provided by the regulations issued under ERISA by the DOL as to the meaning of the statutory reference to LMRA. Basically, the position of DOL is that all the reference to LMRA adds to the definition of 'welfare plan' is the inclusion of holiday and severance benefits and similar programs. All other references in LMRA § 302(c) either duplicate benefits described in ERISA § 3(a)(A) or describe benefits which are not provided through employee benefit plans." *Id.*, citing 29 C.F.R. § 2510.3-1(a)(3) (1979).

* Some welfare plans are exempt from regulation: governmental plans (including plans of certain international organizations), certain church plans, plans "maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws," Title I § 4(b)(3); 29 U.S.C. § 1003(b)(3), and unfunded plans which provide benefits or contributions in excess of those allowable for tax-qualified plans.

** The fiduciary must act solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to them and defraying reasonable expenses of administering the plan. Title I §§ 404(a)(1) and (A), 29 U.S.C. §§ 1104(a)(1) and (A). Title I codifies the "prudent man" rule deriving from the common law of trusts. See 1 Restatement of Trusts 2d § 174 (1959); King v. Talbot, 40 N.Y. 76, 86-87 (1869); Harvard College v. Amory, 9 Pick. 446, 461 (Mass. 1830).

In order to prevent conflicts of interest, fiduciaries are barred from certain transactions, § 406, 29 U.S.C. § 1106, subject to numerous exceptions, § 408(b), 29 U.S.C. § 1108(b).

(footnote continued on next page)

§§ 1101-1114, and are covered by provisions as to administration and enforcement, §§ 501-514, 29 U.S.C. §§ 1131-1144. Unlike pension plans, welfare plans are excluded from provisions as to vesting, §§ 201-211, 29 U.S.C. §§1051-1061, inalienability of benefits, § 206(d)(1), 29 U.S.C. § 1056(d)(1), and funding, §§ 301-306, 29 U.S.C. §§ 1081-1086.

ERISA imposes duties of reporting and disclosure upon welfare plans, holds their trustees to standards of responsibility, and provides means of statutory enforcement. As to welfare plans, in sum, ERISA is fiduciary legislation, regulating the behavior of trustees and administrators, but not distribution of benefits or payments from plan assets.

Some of the fiduciary provisions are not yet effective, the effective dates ranging from January 1, 1975 to December 31, 1984. § 414, 29 U.S.C. § 1114. Regulations permit applications for postponement of the effective date of certain provisions as to fiduciary responsibility; see 29 C.F.R. §§ 2550.4146-1ff.

Part 5 of Title I provides criminal penalties for a violation of any provision as to reporting and disclosure, § 501, 29 U.S.C. § 1131, and enables participants and fiduciaries to redress their rights or enjoin statutory violations through civil actions. § 502, 29 U.S.C. § 1132. Any plan can sue or be sued under ERISA as an entity. § 502(d), 29 U.S.C. § 1132(d).

Title I forbids any person to discharge, fine, suspend, expel, discipline or discriminate against a participant or beneficiary for exercising any right under the plan or under ERISA or its predecessor statute, or to interfere with the attainment of any such right. §§ 510, 511, 29 U.S.C. §§ 1140, 1141.

Welfare plans are required to provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, and must afford a reasonable opportunity for full and fair review to any participant or beneficiary whose claim for benefits has been denied. § 503, 29 U.S.C. § 1133.

Title I confers investigative and rulemaking powers upon the Secretary of Labor, §§ 504, 505, 29 U.S.C. §§ 1134, 1135, and authorizes him to cooperate with other government agencies and utilize the services of federal and state agencies, § 506, 29 U.S.C. § 1136.

ERISA's preemption clause* is in four parts. Subsection (a) describes those portions of ERISA which exert

---

* "(a) Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). This section shall take effect on January 1, 1975.

(b)(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 4(a), which is not exempt under section 4(b) (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 506 of this Act.

(4) Subsection (a) shall not apply to any generally applicable criminal law of a State.

(5)(A) Except as provided in subparagraph (B), subsection (a) shall not apply to the Hawaii Prepaid Health Care Act (Haw. Rev. Stat. §§ 393-1 through 393-51).

(B) Nothing in subparagraph (A) shall be construed to exempt from subsection (a)—

(i) any State tax law relating to employee benefit plans, or

(ii) any amendment of the Hawaii Prepaid Health Care Act enacted after September 2, 1974, to the extent it provides for more than the effective administration of such Act as in effect on such date.

(C) Notwithstanding subparagraph (A), parts 1 and 4 of this subtitle, and the preceding sections of this part to the extent

(footnote continued on next page)

preemptive force; subsections (a) and (c) describe the targets of such preemptive force; subsections (b) and (d) are savings clauses.

---

they govern matters which are governed by the provisions of such parts 1 and 4, shall supersede the Hawaii Prepaid Health Care Act (as in effect on or after the date of the enactment of this paragraph), but the Secretary may enter into cooperative arrangements under paragraph and section 506 with officials of the State of Hawaii to assist them in effectuating the policies of provisions of such Act which are superseded by such parts.

(6)(A) Notwithstanding any other provision of this section—

(i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides—

(I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and

(II) provisions to enforce such standards, and

(ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this title, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this title.

(B) The Secretary may, under regulations which may be prescribed by the Secretary, exempt from subparagraph (A)(ii), individually or by class, multiple employer welfare arrangements which are not fully insured. Any such exemption may be granted with respect to any arrangement or class of arrangements only if such arrangement or each arrangement which is a member of such class meets the requirements of section 3(1) and section 4 necessary to be considered an employee welfare benefit plan to which this title applies.

(C) Nothing in subparagraph (A) shall affect the manner or extent to which the provisions of this title apply to an employee welfare benefit plan which is not a multiple employer welfare arrangement and which is a plan, fund, or program partici-

(footnote continued on next page)

A. ERISA's preemptive force is not coextensive with the statute as a whole but is explicitly confined to certain regulatory provisions.

The preemption clause in ERISA is selective, not categorical. Only Titles I and IV are preemptive; Title IV has no application here. Because welfare plans are excluded from Parts 2 and 3 of Title I, regulating vesting and funding, see *supra* at 9, and thus from restrictions on alienability of benefits, § 206(d)(1), 29 U.S.C. § 1056(d)(1), the only provisions of ERISA exerting preemptive force in the context of this case are provisions in Title I regulating information, disclosure and fiduciary responsibility.

---

pating in, subscribing to, or otherwise using a multiple employer welfare arrangement to fund or administer benefits to such plan's participants and beneficiaries.

(D) For purposes of this paragraph, a multiple employer welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary determines are guaranteed under a contract, or policy of insurance, issued by an insurance company, insurance service, or insurance organization, qualified to conduct business in a State.

(c) For purposes of this section:

(1) The term 'State law' includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term 'State' includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.

(d) Nothing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 111 and 507(b)) or any rule or regulation issued under any such law." Title I § 514, 29 U.S.C. § 1144, as amended by P.L. 97-473 (1983).

Accordingly, the preemptive force of ERISA is narrower with respect to state laws relating to welfare plans than with respect to state laws relating to pension plans. A precedent acknowledging preemptive force in provisions of Title I applicable exclusively to pension plans does not decide the preemptive force of the provisions which apply to welfare plans. Contrary to the majority opinion below, see 679 F.2d at 1309, *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), does not provide the gauge appropriate here.

Alessi held a state statute preempted by ERISA because it eliminated one method of calculating pension benefits that Congress intended ERISA to preserve. It can be conceded that ERISA regulates methods of calculating pension benefits. See Title I Part 2, 29 U.S.C. §§ 1051-1061. But ERISA does not regulate the calculation of benefits under welfare plans. See Title I § 201, 29 U.S.C. § 1051. *Alessi* settled the preemptive effect of provisions in Title I dealing with pensions. *Alessi* had nothing to do with the preemptive effect of provisions applicable to welfare plans.

Therefore, *Alessi* does not control this case. Indeed, after noting varying decisions "as to the meaning of ERISA's preemptive language in other contexts," this Court refrained from comment, 451 U.S. at 525 n.21 (Marshall, J.), and did not decide ERISA's preemption of state laws different from the statute addressed.

Alessi measures the preemptive force of provisions in ERISA from which welfare plans are excluded. *Alessi* does not purport to measure ERISA's preemptive force over state laws relating to welfare plans, nor imply that ERISA

exerts identical preemptive force whatever the law or whatever the plan.

Alessi's declaration—

> "The only relevant state laws, or portions thereof, that survive this preemption provision are those relating to plans that are themselves exempted from ERISA's scope," 451 U.S. at 523 n.20—

must not be read out of context. *Alessi* analyzes provisions in ERISA and in a state law which relate to pension plans only. Even under the strictest construction, *Alessi's* footnote 20 in the context of this case does not hold ERISA to preempt laws regulating imposition and collection of state taxes.

In enacting ERISA, Congress deliberately refrained from regulating the design, content or distributive provisions of welfare plans or the rights of creditors to reach beneficial interests in such plans. Congress showed it did not intend to occupy that regulatory field to the exclusion of state laws regulating taxation. The provisions in ERISA applicable to pension plans are not relevant. Instead, the intent of Congress is found in the provisions applicable to welfare plans and the selective wording of the preemption clause. The boundaries of the field occupied by Congress in its regulation of welfare plans extend no further than the subject-matter of those provisions selectively declared preemptive: reporting and disclosure, fiduciary responsibility, administration and enforcement. With respect to welfare plans, Congress occupied, at most, the field of fiduciary responsibility. Congress in enacting ERISA did not occupy the field of distribution or pay-out of money by welfare

plans. It is only "the provisions" of Title I which are declared preemptive as to welfare plans, § 514(a), 29 U.S.C. § 1144(a), not the existence of ERISA as a whole.

The preemption clause, therefore, does not delineate a zone of preemptive Congressional silence extending beyond the provisions in Title I explicitly regulating welfare plans. ERISA's preemptive reach does not exceed its regulatory grasp.*

B. The targets of ERISA's preemptive force are limited and specific.

Congress was selective not only in singling out certain provisions of ERISA as exerting preemptive force, but also in identifying their targets. "Any and all state laws" are declared preempted, § 514(a), 29 U.S.C. § 1144(a), but only if the state law may now or hereafter "relate to" an employee benefit plan covered by ERISA. *Id.*

The word "state", moreover, is defined with reference to an instrumentality which "purports to regulate directly or indirectly" the terms and conditions of an ERISA-covered plan. § 514(c), 29 U.S.C. § 1144(c).

This definition resolves the ambiguity in the vague words "relate to". The relationship which is the concern of ERISA's preemption clause is a regulatory relationship. When a state agency seeks to enforce a state law of general applicability, such as a tax law or a statute prohibiting un-

* This conclusion finds support also in ERISA's legislative history. Senator Javits declared that "State laws compelling disclosure . . . imposing fiduciary requirements . . . imposing criminal penalties on failure to contribute to plans—unless a criminal statute of general application . . ." would be preempted. 120 *Cong. Rec.* 29,942 (1974).

lawful discriminatory practices, analysis begins with the question whether the law or the state agency is purporting to regulate the terms and conditions of an employee benefit plan covered by ERISA. The target of preemption is not state law or state action as such but state regulatory law and state regulatory action.

Moreover, because ERISA's preemptive reach does not exceed its regulatory grasp, when a welfare plan rather than a pension plan is involved, the statutory terms "relate to" and "purport to regulate" refer to regulation of reporting, disclosure, fiduciary responsibility and administrative matters regulated by Title I, but do not include regulation of matters not regulated by Title I.

ERISA confers on welfare plans and their fiduciaries no rights or immunities as to claims of creditors on plan assets. Thus, ERISA has nothing to do with the rights of creditors to reach beneficial interests under welfare plans. That remains a matter of state law.

The targets of preemption, therefore, are laws, regulations, rules and orders which are regulatory as to the subject-matter regulated by ERISA. Because ERISA does not regulate the vesting or funding of welfare plans, and places no restrictions on assignment or alienation of benefits under such plans, or on rights of creditors, state laws on such subject-matter offer no preemptive target. Instead, ERISA preempts as to such plans only state laws which regulate reporting, disclosure, fiduciary responsibility and administrative matters regulated by ERISA itself.

C. The action of the California agency offers no target for the preemption clause of ERISA.

The efforts of the California agency to satisfy from trust assets state tax claims against three trust beneficiaries did not "purport to regulate", see § 514(c), 29 U.S.C. § 1144(c), either the terms and conditions of the trust or any matter regulated by provisions in ERISA's Title I applicable to welfare plans. The trust, its terms and conditions, its administration and the responsibilities of its fiduciaries remain the same regardless of those efforts and whatever their outcome.

The trust by its terms provides that California law shall control, together with "pertinent laws of the United States," Agreement and Declaration of Trust § 7.12, see Joint Appendix at 41, and exempts trust assets from the claims of creditors only insofar as "permissible by law", § 4.06, see Joint Appendix at 17.

The trust agreement thus incorporates by reference the state laws relied on by the California agency in attempting garnishment. Invocation of those laws worked no change in preexisting terms and conditions of the trust and introduced no additional layer of regulation. The terms and conditions of the trust were written in a way that permitted the agency's action.

Nor did the agency's action change any ERISA-regulated powers or duties of the trustees. Their fiduciary responsibilities and their administration of the trust remained the same. ERISA requires plan fiduciaries to administer the plan in accordance with consistent plan

documents. § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D). The action of the California agency was consistent with the plan documents of the trust, and these in turn are consistent with ERISA.

The California agency acted to enforce state law dealing with state taxes. The agency did not attempt to regulate the terms and conditions of a welfare plan. The state's concern here—satisfaction of tax claims against delinquent workers—is essentially collateral to the concerns of ERISA for reporting and full disclosure, fiduciary responsibility and fiduciary administration of welfare plans. The California agency acted against the trustees in a manner unrelated to ERISA's regulatory scheme.

Indeed, the action of the California agency in enforcing state tax laws, while only peripheral to ERISA, was essential to the functioning and continued existence of California as a state. See *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). To interpret the preemption clause of ERISA as a barrier to enforcement of tax claims raises hard questions under the Tenth Amendment. Such an interpretation is at odds with language in ERISA and with traditional principles of Federalism.

Conclusion

For the reasons stated, the judgment of the court below should be vacated with directions for remand of the action to the state court.

Dated: February 10, 1983

Respectfully submitted,

JOSEPH I. LIEBERMAN
Attorney General
CHRISTINA G. DUNNELL
Assistant Attorney General
30 Trinity Street
Hartford, Connecticut 06106
(203) 566-2203

ANN THACHER ANDERSON*
General Counsel
New York State
Division of Human Rights
2 World Trade Center
New York, New York 10047
(212) 488-7650

Attorneys for Amici Curiae

**Counsel of Record*